Supreme Court, U. S.
FILED
DEC 19 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 712

JOHN I. MARVIN,
Petitioner

versus

CENTRAL GULF LINES, INC., FORMERLY
CENTRAL GULF STEAMSHIP CORPORATION
Respondent

BRIEF BY RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATION TO OPINION BELOW

The petition for writ of certiorari submitted by petitioner incorrectly cited the decision of the Fifth Circuit Court of Appeals. The correct citation of the appellate opinion, reversing the trial court and reflecting the denial of the petitions for Rehearing and Rehearing En Banc on August 22, 1977, is 554 F.2d 1295.

QUESTIONS PRESENTED

I. Did not the Court of Appeals for the Fifth Circuit properly reverse the judgment of the lower court denying defendant's motion for directed verdict and for judgment notwithstanding the verdict, on the grounds that there was a complete absence of probative facts to support the conclusion reached by the jury?

II. Did not the District Court commit reversible error in submitting the case to the jury and in refusing to grant respondent's motion for directed verdict where the evidence was insufficient to establish any specific negligence on the part of respondent?

STATEMENT OF THE CASE

The Litigation

John I. Marvin, a "bluewater" seaman, filed suit against Central Gulf Lines, Inc. for injuries he allegedly received while working as a crewmember of Central Gulf's S/S GREEN SPRINGS. Marvin asserted that he was injured on January 17, 1972, while assisting in docking the S/S GREEN SPRINGS at Pusan, South Korea, when he was struck by a mooring line with which he was working. Central Gulf filed an answer to the complaint denying any negligence or unseaworthiness and asserting Marvin's sole fault and/or contributory negligence.

The case was tried before a jury on June 12 and 13, 1975. At the close of the plaintiff's case, Central Gulf moved for directed verdict in its favor on the basis that plaintiff had failed to adduce evidence demonstrating the unseaworthiness of the S/S GREEN SPRINGS, and further had failed to adduce evidence of any negligence of Central Gulf which contributed, even in the slightest, to plaintiff's injury.

Central Gulf's motion for directed verdict was denied, and the jury thereafter returned a verdict in the plaintiff's favor finding Central Gulf negligent, the vessel seaworthy, and plaintiff free of contributory negligence, and the plaintiff entitled to damages in the amount of $25,000.00. Central Gulf timely filed a motion for judgment notwithstanding the verdict and for other alternative relief; the motion was denied by the Trial Court.

Central Gulf filed an appeal with the Fifth Circuit Court of Appeals seeking reversal of the denial by the Trial Court of respondent's motion for directed verdict and motion for judgment notwithstanding the verdict. The Fifth Circuit reversed the Trial Court, overturned the jury verdict, and held that the motion for directed verdict should have been granted for the reason that the evidence was insufficient to establish any specific negligence on the part of Central Gulf. Petitioner has filed a petition for writ of certiorari to which this brief is submitted in opposition.

The Casualty

Marvin was a seaman of some experience at the time of his injury. He first began going to sea in 1949 and since 1954 he has been classified as an able-bodied seaman. He joined the S/S GREEN SPRINGS on December 15, 1971, in New Orleans, Louisiana. The S/S GREEN SPRINGS, expecting to call in various Far East ports, arrived in Pusan, South Korea, on January 17, 1972.

As an able-bodied seaman and a member of the dock crew, it was Marvin's duty to assist with docking the ship. When the vessel arrived at its intended berth in Pusan on the morning of January 17, two lines were put out, a bow line and a spring line. The vessel docked "starboard side to" and in connection with the docking a bow line was run from the starboard bow area of the GREEN SPRINGS to a bollard forward of the vessel on the dock. A spring line was run

forward from a bollard on the dock approximately amidships through the starboard bulkhead of the GREEN SPRINGS at the number three chock, and forward through the starboard fairlead and from there aft to the starboard drum of the anchor windlass on the bow of the vessel.

While Marvin's testimony is confused, apparently after the bow line and the spring line were made fast, orders were given to slack off these lines, to move the spring line 150 feet astern to a bollard further down the dock and then to heave on the spring line to move the ship astern.In the task of moving the ship astern, Marvin's job was to handle the spring line. To do this, Marvin, after taking five or six wraps on the drum of the windlass, positioned himself two or three feet astern of the drum of the anchor windlass.

To move the ship astern, of course, all Marvin needed to do after taking the wraps on the drum was to keep tension on the line. To slack the line he merely need have slacked the tension he held on the line.

According to Marvin's account of the accident, after the ship began moving astern, but while still going astern, the line flew off and hit him in the head and face. While in a deposition taken before trial, Marvin admitted lack of knowledge of what struck him and caused his injury, and while at the trial he was still unsure about what had struck him, in large part Marvin believed that he had been struck by the mooring line with which he was working when it jumped the starboard fairlead.

Significantly, however, no witnesses were called on the plaintiff's behalf other than himself, and no documentary

or demonstrative evidence was introduced by the plaintiff which demonstrated a cause of the line "jumping the fairlead." Moreover, Marvin was unable to offer any explanation for the line jumping the fairlead as he contended, other than to say that the line came off "for some reason or other."

After being struck in the face, Marvin was provided with first aid on ship and sent to a hospital in Pusan. After receiving sutures to his face at the hospital, Marvin returned to the ship, picked up some belongings and then returned to the hospital. He remained in the hospital in Pusan for several days, and then was repatriated to the United States, specifically New Orleans. Arriving in New Orleans, he was admitted as an inpatient in the Public Health Service Hospital and continued his inpatient treatment there for approximately two weeks. He was declared fit for duty on March 30, 1972, two and one-half months after the accident, and was willing and able to re-ship at that time.

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

Even under the liberalized test of proof under the Jones Act, petitioner simply failed to carry his burden of proof. While the jury did indeed return a verdict in the petitioner's favor on the negligence issue, the Fifth Circuit Court of Appeals properly held that the evidence and the law make it clear that the case should never have been submitted to the jury for its consideration.

DID NOT THE COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY REVERSE THE JUDGMENT OF THE LOWER COURT DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, ON THE GROUNDS THAT THERE WAS A COMPLETE ABSENCE OF PROBATIVE FACTS TO SUPPORT THE CONCLUSION REACHED BY THE JURY?

At the close of Marvin's case, which consisted only of his testimony and stipulated medical reports, Central Gulf moved for directed verdict in its favor. The Trial Court being greatly disposed to grant the motion, nonetheless denied it with the indication that it would be reconsidered should the jury bring in a verdict. In so ruling, the Trial Court commented that ". . .there may be just barely enough there to go to the Jury." When the Trial Court denied its motion for directed verdict, after reading a stipulation from the pre-trial order, Central Gulf rested.

The Fifth Circuit agreed with Central Gulf that the Trial Court erred in submitting the case to the jury. The proof which the plaintiff adduced was neither "barely enough" nor did it compromise the "scintilla of evidence" required to properly place the matter before the jury for its determination.[1]

It is fundamental that under the Jones Act, damages may only be recovered for negligence, *DeZon v. American President Lines, Ltd.*, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065; *Jamison v. Encarnacion*, 281 U.S. 635, 50 S.Ct. 440,

1. Gunning v. Cooley, 1930, 281 U.S. 90, 94, 50 S.Ct. 231, 74 L.Ed 720; Galloway v. United States, 1943, 319 U.S. 372, 63 S.Ct. 1077; Hawley v. Alaska Steamship Co., 236 F.2d 307 (9th Cir. 1956); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969).

74 L.Ed. 1082; *Buford v. Cleveland & Buffalo Steamship Co.*, 192 F.2d 196, 198 (7th Cir. 1951); *Repsholdt v. United States*, 205 F.2d 852, 856 (7th Cir. 1953). It is equally fundamental that the burden of proving negligence in a Jones Act case is upon the plaintiff. *Gypsum Carrier, Inc. v. Handlesman*, 307 F.2d 525, 534 (9th Cir. 1962); *Diddlebock v. Alcoa Steamship Co.*, 237 F.Supp. 538, 541 (E.D. Pa. 1964); *Schlicter v. Port Arthur Towing Co.*, 288 F.2d 801, 805, 806 (5th Cir. 1961); *Traupman v. American Dredging Co.*, 470 F.2d 736 (2d Cir. 1972).

While Central Gulf, as a vessel owner, was subject to a more liberalized or strict standard of care than that imposed on its landside brethren, the "statute does not prescribe liability without some proof of fault" nor does it relieve a Jones Act plaintiff from showing "facts from which a jury can reasonably infer that either his employer or his co-workers were negligent." *Traupman*, 737, *supra; Armstrong v. Commerce Tankers Corp.*, 311 F.Supp. 1236 (S.D. N.Y. 1969); aff'd. 423 F.2d 957 (2d Cir.) cert. den. 400 U.S. 833, 91 S . Ct. 67, 27 L.Ed. 2d 65 (1970). More succinctly put, "there must be some evidence" of negligence[2] In *Perry v. Morgan Guaranty Trust Company of New York*, 528 F.2d 1378, 1379 (5th Cir. 1976), the Fifth Circuit restated clearly and succinctly that in Jones Act cases "...there must be some evidence from which a jury can infer that an unsafe condition existed and that the owner either knew, or in the exercise of due care, should have known of it." There was no such evidence presented in the record of this case.

In Marvin's petition for writ of certiorari, it is argued that the reversal by the Fifth Circuit was "absolutely

2. *Schlichter, supra*, at 806

contrary to a long and well-established line of decisions of" the United States Supreme Court. In support of this argument petitioner relies on the *Lavender v. Kurn*, 327 U.S. 645 (1946), and the *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523 (1956), decisions which are the exact two Supreme Court cases cited in the opinion of the reversing appellate court. The Fifth Circuit in *Marvin v. Central Gulf Lines, Inc.*, 554 F.2d 1295, 1297, (5th Cir. 1977), stated as follows:

> "Although a Jones Act plaintiff suing in negligence shoulders a lighter burden than his counterpart on land would carry, G.Gilmore & C. Black, Admiralty §§6-35, 6-36 (2d Ed. 1975), we as an appellate court must still overturn a judgment based on a jury verdict in favor of the plaintiff 'when there is a complete absence of probative facts to support the conclusion reached....' *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916, 923 (1946). We look, then, for 'evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn' to support the verdict and, thus, the judgment thereon. *Shulz v. Pennsylvania Railroad*, 350 U.S. 523, 526, 76 S.Ct. 608, 610, 100 L.Ed. 668, 671 (1956). Neither the testimony of Marvin nor the permissible inferences from that testimony supports the jury's finding that Central Gulf was negligent." (Footnotes omitted.)

An examination of the testimony in this case not only leaves one with a clear and distinct understanding that Marvin proved nothing but an injury, the record also demonstrates not a scintilla of evidence upon which Central Gulf's liability can be based. Synopsizing the pertinent parts of Marvin's testimony reveals that while he contended that the line jumped off the fairlead, he did not know and only could *assume* some unknown cause for the occurrence. Moreover, not only does the evidence fail to establish any cause for the line jumping the fairlead, there is a distinct lack of evidence to prove either that the line actually jumped the fairlead or even that the line was what struck Marvin at all. When Marvin was pressed about what hit him, he testified, "maybe the Captain struck me, I don't know."

In any event, the record makes it abundantly clear that Marvin could only assume possible causes for his injury. Even if it be accepted that the line jumped the fairlead, the best explanation and cause Marvin could offer for this occurrence was "...the line was working under a heavy strain, and *for some reason or another*, the line slipped the fairlead."

Petitioner's position that Marvin's testimony was uncontroverted and as such presented sufficient facts to support a jury finding of negligence is untenable. Marvin could not testify with conviction as to *what* hit him, much less, as to *why* something hit him. The gravamen of the Fifth Circuit's reversal was the simple fact that Marvin failed to present sufficient facts to support the jury finding of actionable negligence; Marvin's testimony presented mere assumptions and speculation as was explicitly pointed out in the appellate court's decision in *Marvin, supra*, at 1298, fn. 8, as follows:

"8. On cross-examination, when asked whether he knew for sure that the line jumped the fairlead, Marvin answered as follows: 'I know that something flew through the air and hit me and I can only guess that it was the line come up on the drum and it must have been that the line came off.' The questioning continued: 'All you know is that something hit you?'
Marvin replied, 'Very much so, yes.'

Later Marvin was asked: 'If the line jumped the fairlead, Mr. Marvin, you cannot tell us, today, the reason it jumped the fairlead?' He answered, 'No, I can only assume.'

When deposed prior to trial, Marvin made it clear that he could only surmise that it was the hawser that hit him: 'Well, something hit me. I don't know what it was. All I can say is something hit me, and the best thing I can see, it was the rope, mooring line did it.' "

The evidence, as presented by Marvin, the only witness to testify, failed to establish an evidentiary basis for the jury's conclusion that Central Gulf was negligent. Petitioner very simply failed to carry his burden of proof.

In *Rogers v. Missouri Pacific Ry. Co.*, 1957, 352 U.S. 500, 507, 77 S.Ct. 443, 448 1 L.Ed. 2d 493, the Supreme Court stated a rule of causation making the employer liable in the event of his negligence which contributes even in the slightest manner to his employee's injury. As the *Traupman* Court observed:

> "...several Jones Act and Fela cases...[have allowed juries]...to speculate on the connection between the defendant's admittedly negligent act and the plaintiff's injuries. [Citing cases.]...These cases, however, cannot be read to give a jury the same latitude in determining whether the act complained of was negligently performed in the first place." 470 F.2d 736, 738.

In submitting the case to the jury the district court judge may have been laboring under the erroneous view that the slightest negligence of Central Gulf would be sufficient for fixing liability in this case. Whether he held this erroneous view or not, it is clear that the judge erred in submitting the case to the jury because not even a scintilla of evidence was adduced on which to base a finding of negligence on the part of Central Gulf. Therefore, it likewise follows that the district judge was in error in refusing to grant Central Gulf's motion for judgment notwithstanding the verdict and that the reversal by the Fifth Circuit should be upheld.

Petitioner contends that the appellate court "far exceeded the proper scope of review...by inquiring into the facts of the casualty and by examining the credibility of the plaintiff." This contention is entirely incorrect. The reversing court succinctly described its role in *Marvin, supra,* at 1297, as follows:

> "...we as an appellate court *must* still *overturn* a judgment based on a jury verdict in favor of the plaintiff 'when there is a complete absence of probative facts to support the conclusion reached....' " (Emphasis added.)

The court went on to describe the reviewing procedure, citing the Supreme Court in *Shulz v. Pennsylvania Railroad, supra*, as one in which the appellate court looks for evidence of witnesses' direct statements or proof of circumstances from which inferences can fairly be drawn to support the jury verdict.

The Fifth Circuit in the case at bar followed precisely the above stated procedure by examining the record, which consisted of testimony by the plaintiff alone. There was no examination of Marvin's credibility because credibility is not at issue in this litigation. It is not a question as to whether Marvin was believable, but, merely as to whether there were any facts presented which tended to prove that Central Gulf was negligent and hence liable for Marvin's injury. The reviewing court found that the record did not reflect any direct testimony or inferences sufficient to support the jury's finding of negligence.

After an exhaustive study of the record in this case it is evidence that the jury verdict of negligence was based solely on the closing argument to the jury by counsel for petitioner wherein he made issue of the fact that Central Gulf did not present any witnesses. Petitioner re-urges this point in his petition at page 18 where he re-states that the ship's captain was present in Court but not called to testify. This Court cannot be swayed by petitioner's argument to the jury because, as a matter of law, the burden of proof rested with the plaintiff, Marvin, and he failed to carry his burden to prove that Central Gulf was negligent. Consequently, as a matter of law, Central Gulf was not required, nor even expected, to present testimony to refute that which had simply not been proven.

Respondent respectfully suggests that that portion of petitioner's petition, (contained in essence on pages 12-14, and A-15-21), which comprises an attack on the intentions and motivations of Judge Gee should be disregarded and stricken by this Court as being irrelevant, immaterial, and scandalous matter as is provided by Rule 40(5) of the Rules of the Supreme Court of the United States. The referenced portion of petitioner's petition is a simple and transparent attempt to discredit and embarrass Judge Gee by inferring that he would circumvent or ignore the controlling decisions of this Court.

It is ridiculous and naive of counsel for petitioner to contend that the appellate decision on appeal was solely that of the authoring judge, Judge Gee. The panel was composed of Judges Wisdom, Fay, and Gee. The petitions for rehearing and for rehearing en banc were reviewed and denied by judges other than just Judge Gee.

The charge by petitioner that Judge Gee engaged in advocacy is insulting to the integrity of the appellate procedure and borders on contempt. The decision authored by Judge Gee is a well-reasoned opinion which explains the basis for the reversal by examining the evidence and concluding that there were no probative facts adduced at the trial. The element of advocacy was absent: the appellate court performed the function which the district court was remiss in not undertaking by denial of Central Gulf's motions for directed verdict and for judgment notwithstanding the verdict. The trial testimony and permissible inferences were finally properly reviewed and assessed by the Fifth Circuit Court of Appeals and the order of reversal must stand.

DID NOT THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN SUBMITTING THE CASE TO THE JURY AND IN REFUSING TO GRANT RESPONDENT'S MOTION FOR DIRECTED VERDICT WHERE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH ANY SPECIFIC NEGLIGENCE ON THE PART OF RESPONDENT?

Considering the evidence in its most favorable light to the petitioner's case, the petitioner proved nothing more than an accident and injury when the mooring line under a heavy strain *"for some reason or other"* slipped off the fairlead. It is pertinent to paraphrase here the *Traupman* [3] court's cogent reasoning: A jury will be allowed some latitude in speculating on a connection between admittedly negligent conduct of a defendant and an injury, but may not be permitted the same latitude with respect to determining that there was negligence in the first place.

The reversal by the appellate court was imperative since neither a cursory nor an in depth examination of the record reveals any negligence whatsoever on the part of Central Gulf. The jury, in reaching its finding of negligence, could only have acted out of abuse of discretion or misappreciation of law.

The Fifth Circuit found that the record indicated two possible theories for finding Central Gulf negligent: the procedure of backing the ship may have been inherently dangerous and constituted negligence, or one of Marvin's co-employees may have been negligent in carrying out the docking manuever. After a review of the testimony, the appellate court, *Marvin, supra,* at 1297, 1298, rejected both theories

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3. *Traupman v. American Dredging Co.,* 470 F.2d at 738.

and held as follows:

> "The evidence in the record could not support a jury finding against Central Gulf on the former theory, negligence inherent in the backing procedure employed, since no testimony was heard suggesting that backing the ship in this manner was a particularly dangerous or even unorthodox method. Indeed, *Marvin himself indicated that he had on other occasions assisted in backing a ship in this way.* [Emphasis added and footnote omitted.] Absent any evidence that the method employed was itself in any way unusual or hazardous and the matter being well beyond the ambit, of common knowledge or judicial notice, the jury had no basis for finding that the Central Gulf employees in charge of the GREEN SPRINGS acted negligently in choosing to move the ship in this manner.
>
> "Under the remaining theory of recovery, Marvin's testimony points to his conclusion that the chief mate, who directed the backing operation, was negligent in failing to stop the process (as by instructing Marvin to slack the line) before the line slipped the fairlead and struck Marvin. We are forced to conclude that the evidence likewise failed to make out this ground of recovery."

The reviewing court observed that Marvin was unable to offer any physically cogent reason *why* the line might have jumped the fairlead, and quoted Marvin's testimony that *"for some reason or another the line slipped the fairlead."*

The evidence fails to establish an unsafe procedure and there was no evidence on which to base a conclusion that a co-employee should have seen that the accident was about to occur. *Marvin, supra,* at 1298.

The trial of this case to a jury does not dispense with the requirement that negligence be proved by the plaintiff. *DeZon v. American President Lines, Ltd., supra; Jamison v. Encarnacion, supra; Buford v. Cleveland & Buffalo Steamship Co., supra; Repsholdt v. United States, supra; Gypsum Carrier, Inc. v. Handlesman, supra; Diddlebock v. Alcoa Steamship Co., supra; Schlichter v. Port Arthur Towing Co., supra; Traupman v. American Dredging Co., supra.*

In the case at bar there was a complete and utter failure to establish any proof of negligence on the part of Central Gulf. In returning a verdict for Marvin on the negligence issue, it is clear that the jury let its speculation "run riot."[4] The jury's verdict in Marvin's favor on the negligence issue, in spite of the complete lack of evidence of negligence, demonstrates clearly that its decision was an unpermitted "product of sheer surmise and conjecture."[5] Speculation, of course, "cannot supply the place of proof."[6] The rule of *Lavender v. Kurn,* 327 U.S. 645, 66 S.Ct. 790, 90 L.Ed. 916 (1940), and *Rabb v. Canal Barge Company,* 428 F.2d 201 (5th Cir. 1970) is *not* to the contrary, and in this instance the appearance of reversible error is clear in that "there is a complete lack of probative evidence supporting the jury verdict."

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4. *Buford v. Cleveland & Buffalo Steamship Co., supra,* 199.

5. *Traupman, supra, 738.*

6. *Moore v. Chesapeake & Ohio Railway Co.,* 340 U.S. 573, 578, 71 S. Ct. 430; *Buford v. Cleveland & Buffalo Steamship Co., supra, 199.*

With respect to respondent's position that Marvin simply failed to carry the burden of proof, reference is made to the decision of *Armstrong v. Commerce Tankers Corp.,* 423 F. 2d 957 (2d Cir. 1970). There, as in this case, plaintiff chose to rely upon his own testimony alone in establishing his case. The gravamen of his complaint was that while leaving a cabin aboard ship after one of the occupants of the cabin took offense at something he said, the door of the cabin slammed shut on his thumb "with force" producing a compound fracture. The jury returned a verdict in his favor finding that the negligence of one of his co-employees was the proximate cause of Armstrong's injury. The Trial Court granted defendant's motion for judgment notwithstanding the verdict on the ground that proof of negligence was wholly lacking. In affirming the Trial Court, the Second Circuit Court of Appeals said in pertinent part:

> "Although, as this circuit has emphasized before, a jury's verdict is not lightly to be set aside, it is apparent that the jury's finding that some active negligence was performed by the plaintiff's shipmates was sheer surmise and conjecture. [Citing cases]." 423 F.2d at 960.

Inasmuch as the jury verdict in favor of Marvin was based upon pure surmise and conjecture, as in *Armstrong,* the facts of this case readily support the Fifth Circuit's reversal of the jury verdict and of the district court's refusal to grant the motions for directed verdict and for judgment notwithstanding the verdict.

CONCLUSION

In conclusion, Central Gulf, respondent, urges this Court

to refuse the petition for writ of certiorari for the reason that the Fifth Circuit Court of Appeals properly reversed the judgment of the lower court denying defendant's motion for directed verdict and for judgment notwithstanding the verdict, on the grounds that there was a complete absence of probative facts to support the conclusion reached by the jury. In further support of respondent's position that the petition must be denied is the fact that the reviewing appellate court correctly held that the district court committed reversible error in submitting the case to the jury and in refusing to grant the motion for directed verdict where the evidence was insufficient to establish any specific negligence on the part of Central Gulf.

Finally, in support of respondent's position in opposition to this petition for writ of certiorari, Central Gulf relies on the cogent reasoning of the Fifth Circuit, which reflects a proper review of the evidence in the record:

> "Marvin has not presented any evidence which would support the conclusion that anyone concerned acted negligently in any specific manner while docking the S/S GREEN SPRINGS. All that he, the sole witness, could say was that in the course of a procedure not shown to be uncommon or improper the line somehow came loose and struck him. No evidence was even presented as to the manner in which this did or could have happened, let alone that it resulted from anyone's carelessness. . . .[T]he burden of proving negligence and causation in a Jones Act case is a light one, but even at sea injury does not presuppose negligence." *Marvin, supra* , at 1299.

Respondent, Central Gulf, urges this Court to recognize that the Fifth Circuit was correct in reversing the district court and in overturning the jury verdict for the obvious reason that Marvin failed to carry the burden of proof and, hence, the evidence presented did not justify a finding of negligence.

For the above stated factual and legal reasons, it is respectfully submitted that the petition for writ of certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this reply brief have been served on counsel for petitioner, John I. Marvin, by placing same in the U.S. Mail, postage prepaid, properly addressed to Bruce A. North, 820 Gravier Street, Suite 500, New Orleans, Louisiana 70112, this 16th day of December, 1977.

JOHN J. BRODERS